



MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMITTEE MEMORANDUM

TO: Members of the Land Use and Development Committee

FROM: Jimmy L. Morales, City Manager

DATE: September 21, 2016

SUBJECT: **ADDENDUM NO. 2 TO THE LAND USE AND DEVELOPMENT COMMITTEE MEETING AGENDA**

2. Amendment To Sec. 118-394 Of The City Code To Expand And Better Define The Discontinuance Procedures For Legal Non-Conforming Uses.

(Sponsored by Commissioner Michael Grieco
July 13, 2016 City Commission Meeting, Item R5 I)

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COMMITTEE MEMORANDUM

TO: Land Use and Development Committee

FROM: Jimmy L. Morales, City Manager

DATE: September 21, 2016

SUBJECT: **Discussion Regarding A Proposed Zoning Ordinance Amendment To Amend Sec. 118-394 Of The City Code To Expand And Better Define The Discontinuance Procedures For Legal Non-Conforming Uses.**

HISTORY

On July 13, 2016, at the request of Commissioner Michael Grieco, the City Commission referred this request to the Land Use and Development Committee (Item R5I).

On July 20, 2016, the Land Use and Development Committee discussed the item and continued the discussion until September 21, 2016 by acclamation.

ANALYSIS

When the City Code is amended in a way that prohibits a use or restricts the use in a zoning district, those existing uses in the district that are not conforming to the new regulations that are pre-existing become legal non-conforming uses. Legal non-conforming uses are allowed to continue their operation as long as the use remains active and does not cease operations for a time period set forth in the City Code Section 118-394. The current language in the City Code regarding the discontinuance of a non-conforming uses is stated below:

Sec. 118-394. - Discontinuance of nonconforming uses.

No building, structure, equipment, fixtures or land, or portion thereof, used in whole or in part for a nonconforming use which remains idle or unused for a continuous period of six months, or for 18 months during any three-year period whether or not the equipment or fixtures are removed, shall again be used, except in conformity with the regulations of the district in which such building or land is located.

With the recent amendments to the City Code, such as prohibited uses near residential zoning districts and the operating hours of alcoholic beverage establishments, many questions have been raised about what happens to those businesses that are already in operation. Some of those questions that have been asked are:

1. Is six months a reasonable amount of time for a property owner to find another tenant and prepare the building or space for the new tenant?

2. What is the meaning or interpretation of the "remains idle or unused" portion of the code section? Should that language be changed?
3. What evidence, such as the expiration of the business tax receipt (BTR) and the suspension of payments of resort taxes can be used to prove idleness?
4. Does a building permits issued for the repair/renovation of a building or interior space extend the time frame (toll the time limit or in layman's terms "stop the clock?")
5. What role does litigation play (e.g. a tenant in dispute with a property owner vacates a legal non-conforming space, while still paying rent, to use as leverage)?

Currently, in the cases of legal non-conforming uses, in order for staff to establish the uses idleness, staff researches the BTR and building permit history. If the BTR has not been expired for more than six (6) months, or a building permit has been issued within the six months, that would have tolled the time until the building permit was finalized, then the non-conforming use would not be allowed to continue.

Planning staff does not have any objections to increasing the time frame for legal non-conforming uses to twelve (12) months. A year is a more reasonable amount of time to find a tenant, contract with design professionals, apply for building permits and obtain a building permit. The increase in the amount of time might help in the case of tenant disputes as well.

As a point of clarification, the reason staff uses the application for a renovation or repair of a property to toll the time limit, although that provision is not explicitly written into the current ordinance, stems from the case of *City of Miami Beach v. State ex rel. Parkway Co.*, 174 So. 443 (Fla. 1937). In that case, the Florida Supreme Court held that a use was not discontinued for the purpose of the Miami Beach ordinance if the use had been shut down for the purpose of renovations or repairs.

The attached draft ordinance would better define the protocol for retaining legal non-conforming uses and sets forth and codified some guidelines for determining idleness.

CONCLUSION

The Administration recommends that the Land Use and Development Committee discuss the matter and provide appropriate policy direction.

JLM/SMT/TRM/TUI

**NONCONFORMING USE DISCONTINUANCE
REGULATIONS**

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 118, "ADMINISTRATION AND REVIEW PROCEDURES", ARTICLE IX., "NONCONFORMANCES," TO ADD SECTION 118-390 "PURPOSE/APPLICABILITY," AND AMEND SECTION 118-394, "DISCONTINUANCE OF NONCONFORMING USES" TO DEFINE THE PROTOCOL FOR RETAINING LEGAL NON-CONFORMING USES AND SET FORTH GUIDELINES FOR DETERMINING INTENTIONAL AND VOLUNTARY ABANDONMENT OF A NONCONFORMING USE AND PROVIDING FOR CODIFICATION, REPEALER, SEVERABILITY, AND AN EFFECTIVE DATE.

WHEREAS, various changes to the City Code have made some uses prohibited in commercial zoning districts in close proximity to residential zoning districts; and

WHEREAS, in the zoning districts, that have been subject to the City Code changes, there are pre-existing businesses that have become existing legal non-conforming uses; and

WHEREAS, the City Code allows those existing non-conforming uses to remain and change ownership and tenancy as long as the use remains active and does not become idle for a period of time set forth in the City Code; and

WHEREAS, the City Code is not specific about the protocols for determining if a use has remained active and not idle; and

WHEREAS, the Mayor and the City Commission desire to expand the time frame set forth in the City Code for legal non-conforming uses to obtain permits to repair or renovate their premises; and

WHEREAS, the Florida Supreme Court found that a use was not discontinued for the purpose of the Miami Beach ordinance if the use had been shut down for the purpose of renovations or repairs. [See *City of Miami Beach v. State ex rel. Parkway Co.*, 174 So. 443 Fla. 1937 and *Maroon v. Miami-Dade County*, 6 Fla. L. Weekly Supp. 754d (11th Judicial Circuit in and for Miami-Dade County) (holding that county commission did not depart from essential requirements of law when it determined that apartment building had not lost its nonconforming status by virtue of having been temporarily vacant for six months when owner continued to make repairs, kept utilities running, and negotiated future rental of the property); and

WHEREAS, the Mayor and City Commission desire to encourage uses that are compatible with the character of the neighborhood; and

WHEREAS, the amendments set forth below are necessary to accomplish all of the above objectives.

NOW THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA.

SECTION 1. Chapter 118, "Administration and Review Procedures," Article IX, "Nonconformances," is hereby amended as follows:

CHAPTER 118.

ADMINISTRATION AND REVIEW PROCEDURES

* * *

ARTICLE IX. NONCONFORMANCES

118-390 Purpose/Applicability.

1. Nothing contained in this article shall be deemed or construed to prohibit the continuation of a legally established non-conforming use, structure, or occupancy, as those terms are defined in Sections 114.1. The intent of this Section is to encourage nonconformities to ultimately be brought into compliance with current regulations. This section shall govern in the event of conflicts with other regulations of this code pertaining to legally established nonconforming uses, structures, and occupancies.

2. The term "nonconformity" shall refer to a use, building, or lot that does not comply with the regulations of this article. Only legally established nonconformities shall have rights under this section.

3. For purposes of this section, the term "expansion" shall mean an improvement, addition, enlargement, extension, or modification to a structure that increases the square footage of the structure.

4. For the purposes of this section, "legally established" shall apply to the following circumstances:

- a. A lot that does not meet the lot frontage, lot width, lot depth, and/or lot area requirements of the current zoning district, provided that such lot met the regulations in effect at the time of platting.
- b. A site or improvement that is rendered nonconforming through the lawful use of eminent domain, an order of a court of competent jurisdiction, or the voluntary dedication of property.
- c. An existing use which conformed to the code at the time it was established.
- d. A building and/or site improvement that was permitted in accordance with regulations in effect at the time of permitting or that was approved pursuant to a public hearing.

- e. A building and/or site improvement that had received final site plan approval through a public hearing pursuant to this chapter or through administrative site plan review or had a valid building permit.
- f. There shall be no variance of the nonconforming use(s) section of this Article IX.

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Sec. 118-394. Discontinuance of nonconforming uses.

* * *

~~No building, structure, equipment, fixtures or land, or portion thereof, used in whole or in part for a nonconforming use which remains idle or unused for a continuous period of six months, or for 18 months during any three-year period whether or not the equipment or fixtures are removed, shall again be used, except in conformity with the regulations of the district in which such building or land is located.~~

(1) A nonconforming use may not be enlarged, extended, intensified, or changed, except for a change to a use permitted in the district in which the property is located, except as provided below.

- a. A nonconforming use may be extended through portions of a building manifestly arranged or intended for such use, and,
- b. A nonconforming use shall not extend to occupy land outside such building or any additional building not used for such nonconforming use at the time that nonconforming status was established.

(2) If there is an intentional and voluntary abandonment of a nonconforming use for a period of more than 365 consecutive days, or if a nonconforming use is changed to a conforming use, said use shall lose its nonconforming status. Thereafter, subsequent occupancy and use of the land, building, and/or structure shall conform to the regulations of the districts in which the property is located and any structural alterations necessary to conform the structure or building to the regulations of the district in which the property is located shall be required. An intentional and voluntary abandonment of use includes, but is not limited to, vacancy of the building or structure in which the nonconforming use was conducted, or discontinuance of the activities consistent with or required for the operation of such nonconforming use.

(3) Upon the Planning Director own action or through the formal decision process the Planning Director or his or her designee will evaluate the evidence of a voluntary abandonment of a nonconforming use and determine the status of the nonconforming use. The evidence, collectively, must at a minimum demonstrate the following:

- 1. Continual operation of the use;
- 2. Continual maintenance of the structure and property;

3. Continual possession of any necessary and valid state and local permits, licenses, or active/pending application(s) for approval related to prolonging the existence of the use.

Evidence of an intentional and voluntary abandonment of a nonconforming use may include, but is not limited to, public records, utility records, property records, personal records, or other general research and documentation as follows:

1. Public records, including those available through applicable City of Miami Beach Miami Dade County, and State of Florida agencies;
2. Utility records, including water/sewer accounts, solid waste accounts, and electricity accounts;
3. Property records, including executed lease or sales contracts and real estate listings for property sale/lease/rent;
4. Personal records, including photographs and notarized statements of direct personal observations;
5. Other general research and documentation, photographs, aerials and other maps available through a geographic information system.

* * *

SECTION 2. REPEALER.

All ordinances or parts of ordinances and all section and parts of sections in conflict herewith are hereby repealed.

SECTION 3. CODIFICATION.

It is the intention of the City Commission, and it is hereby ordained, that the provisions of this Ordinance shall become and be made part of the Code of the City of Miami Beach, as amended; that the sections of this Ordinance may be re-numbered or re-lettered to accomplish such intention; and that the word "ordinance" may be changed to "section" or other appropriate word.

SECTION 4. SEVERABILITY.

If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

SECTION 5. EFFECTIVE DATE.

This Ordinance shall take effect ten days following adoption.

PASSED and ADOPTED this ____ day of _____, 2016.

Philip Levine
Mayor

ATTEST:

Rafael E. Granado

Verified By:

Thomas R. Mooney, AICP
Planning Director

City Clerk

(Sponsored by Commissioner Michael Grieco)

Underline denotes new language

~~Strikethrough~~ denotes removed language

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